Tang Kam Thai & Ors v Langkah Cergas Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1–22–1351 OF 2002
JAMES FOONG J
29 APRIL 2005

Land Law — Sale and purchase of property — Sale and purchase agreement — Delivery of vacant possession — Failure to complete — Liquidated damages — Whether circumstances beyond control

This was an application of the plaintiffs under O 22A r 3(1)(a) and (e) of the Rules of High Court 1980 to order the first defendant to pay an interim payment of RM2,003,425 to the plaintiffs. The first defendant was a property developer. Save and except the ninth, 10th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 119th and 120th plaintiffs, all the other plaintiffs were purchasers of residential properties in a project developed by the first defendant ('Residential Properties Purchasers'). The ninth, 10th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 119th, and 120th plaintiffs were purchasers of commercial properties that were also developed by the first defendant ('Commercial Properties Purchasers'). The purchases by the plaintiffs were all evidenced by a written sale and purchase agreements entered into between the plaintiffs and the first defendant. Under the terms and conditions in the sale and purchase agreements the first defendant was to deliver a vacant possession of the properties so purchased by the plaintiffs within a certain specified period leading to the issuance of certificate of fitness to occupy the said properties, which till date had not been issued by the authorities. The plaintiffs in this suit claimed that the first defendant had breached this term and demanded from the first defendant liquidated damages.

Held, allowing the application in part:

(1) The first defendant in its defence had admitted to the delay in handing over vacant possession of the properties to the plaintiffs. Though admitting to such delay, the first defendant blamed it to circumstances beyond its control *inter alia*; the management of the first defendant was under different people prior to their taking over; economic slow down; and changes made by the planning authorities; and that written requests for extension of time for delivery of vacant possession had been made to the Housing Ministry. However, all these did not exempt the first defendant from fulfilling its obligation to pay the Residential Properties Purchasers the agreed liquidated damages as set out in the Residential Properties Purchasers' agreements (see para 15).

(2) The Commercial Properties Purchasers expected the first defendant to manage its affairs properly and professionally so that projects undertaken by them should be completed on time in accordance with the terms of the agreements. Failure to do so was, in itself, proof of willful delay. The

same goes for the excuse of economic slow down affecting the completion of the properties. With adequate and proper planning and forecast, coupled with appropriate actions and remedies, the first defendant ought to have anticipated this and taken appropriate steps to overcome this problem. Failure to overcome this was another factor constituting willful delay (see para 19).

[**Bahasa Malaysia summary**

Ini adalah permohonan oleh plaintif-plaintif di bawah A 22A k 3(1)(a) dan (e) Kaedah-Kaedah Mahkamah Tinggi 1980 yang memerintahkan defendan membayar satu bayaran interim berjumlah RM2,003,425 kepada plaintif-plaintif. Defendan merupakan pemaju hartanah. Kecuali plaintif-plaintif kesembilan, ke-10, ke-16, ke-17, ke-18, ke-19, ke-20, ke-21, ke-22, ke-23 and ke 24, ke-119 and ke-120, semua plaintif-plaintif yang lain merupakan pembeli hartanah perumahan dalam satu projek yang dimajukan oleh defendan pertama ('Pembeli Hartanah Perumahan'). Paintif-plaintif kesembilan, ke-10, ke-16, ke-17, ke-18, ke-19, ke-20, ke-21, ke-22, ke-23 and ke 24, ke-119 and ke-120 merupakan pembeli hartanah komersial yang juga dimajukan oleh defendan pertama ('Pembeli Hartanah Komersial'). Pembelian oleh plaintif-plaintif semua dilaksanakan melalui perjanjian-perjanjian jual beli bertulis di antara plaintif-plaintif dan defendan pertama. Di bawah syarat-syarat dan terma-terma perjanjian jual beli, defendan pertama dikehendaki menyerahkan hak milikan kosong hartanah-hartanah yang dibeli oleh plaintif-plaintif dalam tempoh yang telah ditetapkan diikuti dengan sijil perakuan kesesuaian untuk mendiami, di mana sehingga sekarang tidak dikeluarkan oleh pihak berkuasa. Plaintif-plaintif dalam guaman ini menuntut bahawa defendan pertama telah memungkiri terma ini dan menuntut ganti rugi jumlah tertentu daripada defendan pertama.

Diputuskan, membenarkan sebahagian daripada permohonan:

(1) Defendan pertama dalam pembelaannya telah mengaku lewat menyerah hak milikan kosong hartanah kepada plaintif-plaintif. Walaupun mengaku kepada kelewatan ini, defendan pertama mempersalahkan keadaan di luar kawalannya, *inter alia*, pengurusan defendan pertama berada di bawah pihak yang lain sebelum mereka mengambil alih, ekonomi yang perlahan dan perubahan yang dibuat oleh pihak berkuasa perancangan dan bahawa permohonan tertulis untuk lanjutan tempoh bagi penyerahan milikan kosong telah dibuat kepada Kementerian Perumahan. Akan tetapi semua ini tidak mengecualikan defendan pertama daripada memenuhi obligasi mereka untuk membayar Pembeli Hartanah Perumahan gantirugi jumlah tertentu yang telah disetujui dalam perjanjian Pembeli Hartanah Perumahan (lihat perenggan 15).

(2) Pembeli Hartanah Komersial telah bergantung kepada defendan pertama untuk menguruskan hal-hal dengan betul dan profesional agar projek yang dimajukan dapat diselesaikan dalam tempoh yang ditetapkan dalam perjanjian-perjanjian. Kegagalan untuk membuat sedemikian menunjukkan kelewatan secara sengaja. Begitu juga dengan alasan bahawa keadaan ekonomi yang perlahan menjejaskan penyiapan hartanah. Dengan pelan dan ramalan yang betul, bersama dengan tindakan dan remedi yang wajar, responden pertama seharusnya dapat menjangkakan keadaan ini dan mengambil langkah-langkah sewajarnya untuk mengatasi masalah ini. Kegagalan untuk mengatasinya merupakan faktor satu lagi yang memyebabkan kelewatan yang disengajakan (lihat perenggan 19).]

Notes

For cases on sale and purchase of property generally, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3545–3546.

Cases referred to

Mediahouse Sdn Bhd v Koh Kim Suan [1998] MLJU 300 (refd)
Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd [1987] 2 All ER 181 (refd)

Legislation referred to

Rules of High Court 1980 O 22A r3(1)(a), (c) and (e)

Harwinder Kaur (AJ Ariffin, Yeo & Harpal) for the plaintiffs.
SP Chanravathane (Manjeet Kaur & Associates) for the first, fourth and fifth defendants.

James Foong J:

INTRODUCTION

[1] Enclosure 13 is an application of the plaintiffs under O 22A r3(1)(a) and (e) of the Rules of High Court 1980 ('RHC') to order the first defendant to pay an interim payment of RM2,003,425 to the plaintiffs.

PLAINTIFFS'CLAIM

[2] The first defendant is a property developer.

[3] Save and except the ninth, 10th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 119th and 120th plaintiffs, all the other plaintiffs are purchasers of residential properties in a project developed by the first defendant. For ease of reference I shall be referring them as 'Residential Properties Purchasers'.

[4] The ninth, 10th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 119th, and 120th plaintiffs are purchasers of commercial properties that are

also developed by the first defendant. For these plaintiffs, I shall hereinafter be referring them as 'Commercial Properties Purchasers'.

[5] The purchases by the plaintiffs are all evidenced by written sale and purchase agreements entered into between the plaintiffs and the first defendant.

[6] Under the terms and conditions in the sale and purchase agreements the first defendant is to deliver vacant possession of the properties so purchased by the plaintiffs within a certain specified period leading to the issuance of certificate of fitness ('CF') to occupy the said properties, which till date is not been issued by the authorities. The plaintiffs in this suit claim that the first defendant has breached this term and they are now demanding from the first defendant liquidated damages.

[7] In respect of the sale and purchase agreements involving the Residential Properties Purchasers cl 22 requires the first defendant to complete the residential properties and deliver vacant possession of the same, with water and electricity supply within 36 calendar months from date of the agreements. Then cl 23 specifies that delivery of vacant possession means: upon issuance of the first defendant's architect certificate certifying that the said property has been duly completed; water and electricity have been connected thereto and; the first defendant has applied for CF from the appropriate authorities; provided always that the Residential Properties Purchasers have paid all monies due under the purchase price. And in the event that the first defendant fails to deliver vacant possession within the time as stated then the Residential Properties Purchasers are entitled to be paid 10% per annum of the purchase price for each day of delay as agreed liquidated damages.

[8] In addition to the above cl 24 of the agreements demands the first defendant to complete the common facilities of the residential properties within 36 months from date of the agreements. In the event of default, the first defendant shall pay on a day-to-day basis 10% per annum of the last 20% of the purchase price.

[9] For the Commercial Properties Purchasers, cl 11.1 of their agreements with the first defendant states that the first defendant shall practically complete the said commercial properties within 36 months from date of agreements provided 'the architect's certificate certifying the same shall be conclusive evidence of practical completion of the Premises.' Then if the first defendant 'willfully delay practical completion of the Premises beyond the aforesaid period the Vendor shall pay to the Purchaser agreed liquidated damages calculated from day to day at the rate of eight percent (8%) per innum' from the date of expiry of the 36 months to date of issuance of the certificate of practical completion 'by the first defendant's architect.

[10] For particulars of liquidated damages, the plaintiffs have set out in detail various tables to show the period of delay and the amount due. For the

Residential Properties Purchasers there are two tables: one is for liquidated damages for late delivery of the residential properties and the other is for liquidated damages for failure to complete the common facilities. Calculation on the amount stated in the particulars is up to 20 November 2002.

[11] It is on these amounts stated in the particulars that the plaintiffs are now claiming interim payment from the first defendant.

DEFENCE

[12] The first defendant has raised various defences in its affidavit in reply. I shall deal with them in the course of my deliberation.

THE LAW

[13] The law on interim payment is well set out in O22A of the RHC and elaborated in the judgment of Faiza Tamby Chik J in *Mediahouse Sdn Bhd v Koh Kim Suan* [1998] MLJU 300. To succeed in this application the Court must be satisfied that:

(a) the first defendant has admitted liability for the plaintiffs' damages;

(b) or that if the action proceeded to trial the plaintiff would obtain judgment for substantial damages against this defendant.

[14] On the burden of proof, it is accepted that 'something more than a prima facie case is clearly required, but not proved beyond reasonable doubt' (*Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd* [1987] 2 All ER 181 at p 187).

ANALYSIS

[15] The plaintiffs claim that the first defendant in its defence has admitted to delay in handing over vacant possession of the properties to the plaintiffs. I agree with them after perusing the defence of the first defendant. Admission is found in paras 13, 14 and 15 of the defence where the defendant explained that this was an abandoned project and, in para 16 the first defendant expressly states that the delay in reviving the project has taken 24 months. Then in para 17, the first defendant accused the Residential Properties Purchasers of having bought these properties at a low price when the cost of construction is much higher. Further admission is found in para 42 of the defence. Though admitting to such delay, the first defendant blamed it to circumstances beyond its control *inter alia*, the management of the first defendant was under different people prior to their taking over; economic slow down; and changes made by the planning authorities; and that written requests for extension of time for delivery of vacant possession has been made to the Housing Ministry. But all these, in my opinion, do not exempt the first defendant from fulfilling its obligation to pay the Residential Properties Purchasers the agreed liquidated damages as set out in the Residential Properties

Purchasers' agreements. The terms therein are explicit. When there is a delay in delivering vacant possession then liquidated damages have to be paid by the first defendant calculated after 36 months from date of agreements to the time when vacant possession is delivered.

[16] On the excuse that the first defendant has written to the Housing Ministry for extension of time to deliver vacant possession I cannot accept this as an excuse since exemption is only effective when approval is granted; not upon application. Until the said Ministry gives such extension, the time for completion remains as stated in the agreements.

[17] On the excuse that the planning authorities have imposed new demands on the first defendant to comply before CF could be entertained, I find this is a matter for the first defendant, as a developer of the said properties, to deal with. This responsibility cannot be passed onto the purchasers as an excuse for the payment of liquidated damages.

[18] Towards the Residential Properties Purchaser's claim for delay in delivering vacant possession of the common facilities the first defendant asserts that this was completed on time. Various documents showing payments to contractor for jobs conducted in this area as well as architect's certification for sueh works were tendered to support this contention. Having perused these, I am of the view that the first defendant has not proved to the satisfaction of this Court more than a prima facie case on this claim against the plaintiff, at this stage of the 'proceedings. Thus they are not justified in receiving any interim payment from the first defendant for this item claimed.

[19] As for the commercial properties purchasers the principal defence of the first defendant is the absence of proof that the first defendant has willfully delayed the completion of the said property. But based on the same reasons offered by the first defendant for the delay in delivering vacant possession to the Residential Properties Purchasers, I find the first defendant's excuses without legal justification. In fact, poor management by the previous directors of the first defendant is itself a factor for willful delay. The Commercial Properties Purchasers expected the first defendant to manage its affairs properly and professionally so that projects undertaken by them should be completed on time in accordance with the terms of the agreements. Failure to do so is, in itself, proof of willful delay. Same goes for the excuse of economic slow down affecting the completion of the properties. With adequate and proper planning and forecast, coupled with appropriate actions and remedies, the first defendant ought to have anticipated this and taken appropriate steps to overcome this problem. Failure to overcome this is, in my view, another factor constituting willful delay.

[20] The first defendant has raised the issue on the identity, legal status and eligibility of a number of plaintiffs to bring this action. But in para 1 of the defence, the first defendant has admitted that the plaintiffs so named in this

action . are purchasers of the properties as set out in the statement of claim. With such admission, the first defendant cannot challenge the status of these plaintiffs.

[21] The first defendant has raised an objection on the validity of the affidavit affirmed by the first plaintiff for and on behalf of all the other plaintiffs claiming that she has no personal knowledge of facts asserted therein. This claim, I find lacks merits. The first plaintiff has stated that she is speaking for and on behalf of all other plaintiffs and is authorised by them to do so. Then she proceeded to state categorically that her disposition is based on facts within the best of her personal knowledge and from documents she has access to. This, I find is sufficient to entitle her to make the averments in her affidavits.

[22] The first defendant has claimed that if interim payment is made against them, they do not have the means to satisfy such payment and under O 22A r 3(2)(c) of the RHC, the court must take this factor into consideration. Ifind that this provision under O 22A r 3(2)(c) of the RHC only applies to 'personal injuries' claims. It has no application here.

CONCLUSION

[23] The amount of liquidated damages claimed by the plaintiffs for interim payment is calculated up to 20 November 2002. This amount is less than the total sum claimed by the plaintiffs in the statement of claim. Except for the amount that I refused to allow for delay in delivery vacant possession of the common facilities and those plaintiffs that have filed notices of discontinuance, Iallow this plaintiffs' claim in encl 13 with cost in the cause. The amount of interim payment to be paid by the first defendant to the plaintiffs respectively in the proportion as disclosed in the particulars for delay in delivery of vacant possession of the properties is RM1,652.375.

Order accordingly.

Reported by Peter Ling